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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

MCCLELLAN FEDERAL CREDIT UNION,
Petitioner,

v.

DAVID P. PARKER, SR.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE BANK OF AMERICA N.T. & S.A. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF PETITIONER McCLELLAN FEDERAL CREDIT UNION

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I.

ISSUE ON APPEAL AND INTEREST OF THE AMICUS CURIAE[1]

This appeal raises the issue of whether a Chapter 7 debtor who has remained current on all installment payments to a secured creditor may ignore the three statutory alternatives of reaffirmation, redemption or surrender of collateral expressly enumerated in § 521(2) of the United States Bankruptcy Code (11 U.S.C. § 521(2)), and, instead, retain the collateral which secures a dischargeable consumer debt by simply making timely payments under the contract.

Amicus curiae Bank of America N.T. & S.A. ("Bank of America" or "the Bank") has a vital interest in the resolution of this issue, which will have a significant impact on the rights of secured consumer lenders such as Bank of America, as well as on Chapter 7 debtors throughout the United States. Bank of America presently is the fourth largest bank in the country. Bank of America loans money to consumers located in the states which comprise the Ninth Circuit, and throughout the nation, to purchase automobiles and other large consumer goods. For example, in 1997, Bank of America made over $2.8 billion in consumer vehicle loans to over 130,000 customers. Each year, thousands of Bank of America's vehicle loan customers file Chapter 7 petitions and, in lieu of reaffirming their loans, or redeeming or surrendering their vehicles to Bank of America, are permitted by the bankruptcy courts simply to retain their vehicles based upon their unwritten intentions to continue making their contractual installment payments. Because these debtors are being permitted to retain their vehicles without

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that this brief was authored in whole by counsel for amicus curiae, and that no other person or entity, except for amicus curiae, made a monetary contribution to the preparation or submission of this brief.

formally reaffirming their personal liability for any deficiencies, each year Bank of America incurs substantial losses when a large percentage of these debtors eventually stop making payments and their vehicles are surrendered to or repossessed by the Bank. For example, for the 15-month period from June 1997 through August 1998, Bank of America attributed approximately $7.2 million of losses directly to this problem.[2] Concomitantly, the non-debtor borrowing public also is directly impacted by this practice through higher interest rates, since lenders such as Bank of America periodically adjust their vehicle loan rates to account for the magnitude of such losses.

Finally, Bank of America, like many lenders, does business in nearly every jurisdiction in the country. Because, as discussed at length *infra*, there is no uniform interpretation of § 521(2)'s requirements, in some Circuits the Bank can repossess a vehicle once the automatic stay is lifted if the debt has not been reaffirmed, but not in other Circuits, where the courts allow the debt simply to ride through. Likewise, if debtors subsequently default, the Bank can sue the reaffirming debtors but not the ridethrough debtors. All told, the effect of bankruptcy on both debtors' and creditors' property rights and obligations varies depending upon the debtor's geographical location, resulting in non-uniform application of the statute and what the National Bankruptcy Review Commission recently described as a "patchwork of rights and obligations [which] inserts needless complication and cost into the system." "Bankruptcy: The Next Twenty Years," National Bankruptcy Review Commission Final Report, October 20, 1997, § 1.3.3 at 166.

Bank of America believes that this Court's construction of § 521(2) will significantly affect not only Bank of America's

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[2]This figure represents only deficiency losses, and does not include related expenses such as repossession costs and attorneys' fees.

operations but also the operations, rights and/or obligations of every consumer lender and Chapter 7 debtor in the nation.

II.

SUMMARY OF ARGUMENT

As set forth at length below, amicus curiae respectfully submits that this Court should grant Petitioner's petition for a writ of certiorari to determine this important bankruptcy issue for at least four reasons:

(1) To resolve the split of authority among seven United States Circuit Courts of Appeals which have inconsistently interpreted § 521(2);

(2) To reverse those courts, including the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"), whose interpretations of § 521(2) ignore the "plain meaning" of the statute, which mandates that a Chapter 7 debtor surrender, redeem or reaffirm, and, instead, offer the debtor an extra-statutory fourth option of retaining the collateral by simply continuing to make installment payments;

(3) To reverse those courts, including the Ninth Circuit, whose interpretations of § 521(2) are inconsistent with the legislative purpose underlying the 1984 revisions to § 521; and,

(4) To reverse those courts, including the Ninth Circuit, whose constructions of § 521(2) are inconsistent with this Court's recent rulings disfavoring judicially-crafted, extra-statutory constrictions of secured creditors' rights in bankruptcy.

III.

ARGUMENT: REASONS FOR GRANTING THE PETITION

A. This Court Should Grant Certiorari To Resolve The Split Of Authority Among The Seven Circuit Courts Of Appeals Which Have Inconsistently Interpreted § 521(2).

With the Ninth Circuit's decision in *Parker,* there is now a split of authority among *seven* United States Courts of Appeals on the issue of whether the three alternatives of reaffirmation, redemption or surrender of collateral to a secured creditor expressly enumerated in § 521(2) of the United States Bankruptcy Code (the "Bankruptcy Code") are a debtor's exclusive options.

The United States Courts of Appeals for the Fifth, Seventh and Eleventh Circuits have held that a debtor is limited to these three statutory alternatives. *Johnson v. Sun Finance Co. (In re Johnson),* 89 F.3d 249 (5th Cir. 1996); *In re Edwards,* 901 F.2d 1383 (7th Cir. 1990); and, *Taylor v. AGE Federal Credit Union (In re Taylor),* 3 F.3d 1512, *reh'g, en banc, denied,* 11 F.3d 169 (11th Cir. 1993).[3]

With the *Parker* decision, the Ninth Circuit now joins the United States Courts of Appeals for the Second, Fourth and Tenth Circuits, which have held that a fourth option exists, notwithstanding its non-inclusion in § 521(2): a debtor may simply retain collateral, without reaffirming, redeeming or surrendering, provided the debtor's payments to the secured

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[3] Although decided a year before Congress passed the 1984 revisions to § 521, the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") also concluded in *In re Bell* that a debtor who desires to retain secured property must redeem or reaffirm, and that redemption cannot be accomplished through installment payments. *In re Bell,* 700 F.2d 1053, 1056-1058 (6th Cir. 1983).

creditor are current. *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F. 3d 668, *reh'g denied*, ____ F.3d ____ (9th Cir. July 9, 1998); *Capital Communs. Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43 (2d Cir. 1997), *cert. denied*, ____ U.S. ____, 118 S. Ct. 1055 (1998); *Home Owners Funding Corp. of America v. Belanger (In re Belanger)*, 962 F.2d 345 (4th Cir. 1992); and, *Lowry Federal Credit Union v. West*, 882 F.2d 1543 (10th Cir. 1989).

This Court should grant certiorari to resolve the significant split of authority regarding this important issue.

B. This Court Should Grant Certiorari To Reverse The Ninth Circuit, Whose Decision Ignores The Plain Meaning Of § 521(2) And Is Inconsistent With Both The Legislative Purpose Of The Statute And This Court's Rulings Disfavoring Judicially-Crafted Constrictions Of Secured Creditors' Rights.

The Bankruptcy Code provides a Chapter 7 debtor who is current on his or her payments to a secured creditor with *only* three express options for the treatment of the secured creditor's collateral: surrender, reaffirmation or redemption.

Section 521(2) of the Bankruptcy Code (11 U.S.C. § 521(2))[4] requires a Chapter 7 debtor: (1) to file a timely statement of his or her intention either to retain the collat-

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[4] 11 U.S.C. § 521(2) provides:

(2) [I]f an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate —

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such

eral which secures a dischargeable consumer debt, or to surrender that collateral to the secured creditor, and (2) to retain or surrender the collateral, as appropriate, within forty-five days after filing the statement of intent. If a debtor elects to retain possession of collateral, then the Bankruptcy Code expressly provides two alternative methods for effecting that retention: the debtor may elect to reaffirm the debt pursuant to 11 U.S.C. § 524(c), or to redeem the collateral pursuant to 11 U.S.C. § 722.

By electing to "reaffirm" under § 524(c), a debtor enters into a voluntary agreement with the secured creditor to repay all or part of a debt which otherwise would have been discharged through the debtor's Chapter 7 bankruptcy. If the debtor subsequently defaults on payments to the secured creditor, then the debtor would be personally liable for the debt.

Alternatively, pursuant to § 722, a debtor may redeem collateral primarily intended for personal, family or household use if the debtor "redeems" the property from a lien that secures a dischargeable consumer debt by paying the secured creditor a lump sum payment equal to the lesser of the fair market value of the collateral or the amount of the claim as of the petition date.

In the case at bar, Respondent David P. Parker, Sr. ("Respondent") filed his statement of intention pursuant to

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property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title.

11 U.S.C. § 521(2) indicating his desire to reaffirm his automobile-secured loan with Petitioner McClellan Federal Credit Union ("Petitioner"). Petitioner and Respondent timely executed a reaffirmation agreement and lodged the agreement with the United States Bankruptcy Court for the Northern District of California (the "Bankruptcy Court"). The Bankruptcy Court *sua sponte* set the matter for hearing, and, upon learning that Respondent was "current" in his payments to Petitioner, refused to approve the reaffirmation agreement, instructing Respondent that he instead could retain possession of the automobile without reaffirming by simply continuing to make monthly payments. The Bankruptcy Court subsequently entered a discharge of Respondent's debts under 11 U.S.C. § 727, including the obligation to Petitioner. Petitioner appealed to the United States Bankruptcy Appellate Panel for the Ninth Circuit, which dismissed the appeal based upon Petitioner's alleged lack of standing to bring an appeal. Petitioner then appealed to the Ninth Circuit. The Ninth Circuit, after concluding that Petitioner did have standing, affirmed the Bankruptcy Court's interpretation of the options available to Respondent under § 521(2).[5]

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[5]Bank of America does not address whether the lower courts were correct in their holdings regarding Petitioner's standing, as the creditor party to the proposed reaffirmation agreement, to file an appeal from a bankruptcy court ruling denying approval of a reaffirmation agreement because the Bank has nothing to add to Petitioner's and amicus curiae California Credit Union League's argument. Rather, this brief addresses only the propriety of the lower courts' conclusion that there is an extra-statutory alternative available to a Chapter 7 debtor other than the surrender, redemption and reaffirmation options expressly set forth in the Bankruptcy Code. However, Bank of America concurs with and supports Petitioner's arguments regarding the standing issue.

1. As a matter of statutory construction, the Ninth Circuit's recognition of an extra-statutory "retention-through-payments" alternative is inconsistent with the plain meaning of § 521(2).

Focussing upon the phrase "if applicable" in § 521(2)(A), the Ninth Circuit has joined several other courts in concluding that the language of § 521(2) is not mandatory, and that a Chapter 7 debtor has the extra-statutory option, not expressed in § 521(2), of retaining secured property without either reaffirming or redeeming so long as the debtor continues to make payments on the installment contract. According to these courts, if a debtor who wishes to retain collateral does not *want* to redeem or reaffirm, then these options are not "applicable".

As a matter of statutory construction, this approach is clearly flawed in several respects.

As a threshold matter, such an interpretation is wholly inconsistent with the plain meaning of the statute, which is controlling[6], and completely ignores the fact that the statute

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[6]This Court has stated in several recent decisions involving the interpretation of provisions of the Bankruptcy Code that statutes should be interpreted literally. Furthermore, this Court has placed an "exceptionally heavy" burden on proponents of any other construction. *See, e.g., Union Bank v. Wolas,* 502 U.S. 151, 156 (1991); *Toibb v. Radloff,* 501 U.S. 157, 162 (1991); *Patterson v. Shumate,* 504 U.S. 753, 757-758, *reh'g denied,* 505 U.S. 1239 (1992); *Barnhill v. Johnson,* 503 U.S. 393, 400 (1992); *Rake v. Wade,* 508 U.S. 464, 473 (1993).

The task of interpreting a statute begins "with the language of the statute itself". *United States v. Ron Pair Enters.,* 489 U.S. 235, 241 (1989). A court must look first to the text of the statute and construe its terms according to their plain meaning. *See, e.g., Ron Pair,* 489 U.S. at 241. In determining a statute's plain meaning, it is assumed that, absent any contrary definition, "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning". *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership,* 507 U.S. 380, 388 (1993) ("There is, of course, no more persuasive evidence of the

itself expressly states that the three enumerated options of § 521(2)(A) are both *mandatory* and *exclusive*. Section 521(2)(A) provides: "The debtor *shall* file . . . a statement of his intention . . . ." (Emphasis added.) Likewise, § 521(2)(B) provides that "the debtor *shall* perform his intention . . ." (Emphasis added). *See, e.g., Edwards,* 901 F.2d at 1386; *Johnson,* 89 F.3d at 252. Thus, a debtor is not simply permitted to select one of the options provided, but rather is expressly *required* to do so, and further is expressly *required to perform* the selected option.

Second, the complete absence of statutory language supporting the concept of retaining collateral by simply continuing to make payments is quite telling. *Nothing* in the plain language of § 521(2) provides a debtor with an option to retain collateral without redeeming or reaffirming. *See e.g., In re Taylor,* 3 F.3d 1512, 1516 (11th Cir. 1993). Therefore, the tenet of *expressio unius est exclusio alterius* applies. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993) ("When certain matters are expressly provided for in a statutory

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purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982). Where the statutory scheme of the Bankruptcy Code is coherent and consistent, a court need not inquire beyond the statute's language. *Ron Pair,* 489 U.S. at 241. And, where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms". *Ron Pair,* 489 U.S. at 241, *quoting Caminetti v. United States,* 242 U.S. 470, 485 (1917).

Finally, it is well settled that absent specific statutory authority, a bankruptcy court may not apply its general equitable, discretionary powers to disregard or contravene unambiguous statutory language. *See, e.g., Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 205-207 (1988) ("[w]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

provision, other matters which were not included in the express provision are excluded by implication.").[7]

Third, the Ninth Circuit's construction of the statute is flawed because the creation of a retention-through-payments option effectively would nullify the portions of § 521(2) which allow for reaffirmation and redemption.[8] It is a well-established canon of statutory construction that a court must read a statute in a manner which gives meaning and practical effect to each word used. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). As a practical matter, why would a debtor who is current on his or her installment payments *ever* want to reaffirm personal liability for a debt when he or she could retain the collateral by simply continuing to make monthly payments? Even if one could envision instances where a debtor would elect to reaffirm, clearly this would not be the situation in the

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[7]The exclusivity of the § 521 requirements also is supported by the Official Bankruptcy Form for the § 521 election. Rule 1007(b)(2) of the Federal Rules of Bankruptcy Procedure requires a Chapter 7 debtor to file a statement of intention, "prepared as prescribed by the applicable Official Form". Official Form 8 limits a debtor's options to reaffirmation, redemption or surrender. The form does not include an option for retaining the collateral by keeping current on installment payments.

[8]As the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") reasoned in *Edwards:*

> [R]eaffirmation is supposed to involve a fully voluntary negotiation on both sides. Permitting a debtor to retain property while keeping up installment payments without a reaffirmation of personal liability allows a debtor to force a new arrangement on a creditor. This negates the voluntarism contemplated by the statute . . . . No debtor would reaffirm personal liability unless required to do so . . . .

Edwards, 901 F.2d at 1386-1387. And, as the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") noted in *Taylor*, permitting a debtor to retain collateral without performing either redemption or reaffirmation would render both of these alternatives "nugatory". *Taylor*, 3 F.3d at 1515, *discussing In re Kennedy*, 137 B.R. 302, 304 (Bankr. E.D. Ark. 1992).

majority of cases. The fact that an extra-statutory, judicially-created alternative could take precedence over the options expressly stated in § 521(2) strongly suggests that such an interpretation of § 521(2) cannot be correct.

Finally, the Ninth Circuit's interpretation of the "if applicable" language in § 521(2)(A) is simply illogical. Section 521(2)(A) provides in relevant part that "the debtor shall file with the clerk a statement of his intention with respect to the *retention or surrender* of such property and, *if applicable*. . ." (Emphasis added.) In interpreting the phrase "if applicable", one logically would not look to the language following the phrase for a definition, but rather would look to the language immediately preceding the phrase. *See, e.g., Taylor,* 3 F.3d at 1516. Obviously, if a debtor intends to surrender collateral, the options of redemption or reaffirmation make no sense, and, therefore, are inapplicable. The phrase "if applicable" clearly refers to the retention of such collateral, which is the only remaining situation described in the statute. If a debtor intends to retain collateral, the options of reaffirmation or redemption are applicable, and the debtor is required to choose one of these alternatives. *See, e.g., Taylor,* 3 F.3d at 1516.[9]

An interpretation of the "if applicable" language which results in permitting retention-through-payments also ignores the provisions of § 521(2)(B). Section 521(2)(B) requires a debtor, within 45 days of the filing of the state-

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[9]Although the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") ultimately concluded in *Lowry* that "nothing within the Code makes either course [*i.e.*, redemption or reaffirmation] exclusive", even the Tenth Circuit acknowledged that "[t]here is no room within the direct language of the section to presume [the language is not mandatory]". *Lowry,* 882 F.2d at 1545-1546. The *Lowry* court further refused to interpret the "if applicable" language as permitting the debtor other options because such an interpretation "is inconsistent with the plain meaning of the statute . . . ." *Lowry,* 882 F.2d at 1545, n.2.

ment of intention, to "perform his intention with respect to such property . . .". As the Eleventh Circuit reasoned in *Taylor,* the statute obviously contemplates that a debtor must do some act which is capable of being performed within a specific period of time. If a debtor is to surrender, redeem or reaffirm, he must do so within the prescribed 45-day period. These are specific acts which can be performed within such a time frame. By contrast, retaining collateral through keeping up current payments is not an act capable of being performed within 45 days. Rather, performance of the duty to continue making payments according to the terms of the contract is not concluded until the expiration of the contract, a period of time that ordinarily would be well beyond the 45-day limit. Additionally, "retention" does not make sense as an option under § 521(2)(B) because retention would not be a duty which a debtor needs to "perform", since the debtor already has possession of the collateral. *See, e.g., Taylor,* 3 F.3d at 1516. The statute contemplates that a specific act will be performed, and by no logical means can "retain and keep current" be construed as such an act.

Finally, § 521(2)(B) does not contain the phrase "if applicable". If the drafters of § 521(2)(B) had contemplated retention-through-payments, then logically one would expect the phrase "if applicable" also to appear in § 521(2)(B).

2. The Ninth Circuit's decision also is inconsistent with the legislative intent underlying the 1984 Amendments to § 521.

This Court has instructed that there is no need to refer to legislative history when a statute's "plain meaning" is clear on its face. *See, e.g., Toibb v. Radloff,* 501 U.S. 157, 162 (1991); *Barnhill v. Johnson,* 503 U.S. 393, 400 (1992). As set forth *supra,* Bank of America believes that § 521(2)

unambiguously requires a debtor to surrender, redeem or reaffirm. However, if this Court finds it necessary to resort to legislative history to interpret this statute, the Bank believes that this Court must conclude that the Ninth Circuit's endorsement of the Bankruptcy Court's *sua sponte* formulation of an extra-statutory retention-through-payments alternative is clearly inconsistent with the legislative purpose.

Congress added § 521(2) to the Bankruptcy Code when it passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984). Prior to the enactment of these amendments, a debtor could obtain bankruptcy relief without taking action with respect to collateral which secured a consumer debt. Following discharge, questions often arose regarding the debtor's and creditor's interests in the collateral, including whether a creditor could foreclose when the debtor's only default was the breach of an insolvency clause, and whether the property could be redeemed under § 722. *See, e.g., In re Brock,* 23 B.R. 998 (Bankr. D.D.C. 1982); *In re Cassell,* 41 B.R. 737 (Bankr. E.D. Va. 1984). To resolve these and other issues, including the problem of quickly depreciating consumer goods, Congress amended § 521 to require a debtor to take affirmative action with respect to the creditor's collateral within a defined time frame before its value seriously diminished. *See, e.g.,* 1987 Bankruptcy Code, Collier Pamphlet Edition, Comment to § 521. As discussed at length *supra,* pursuant to the language added by the 1984 amendments, a debtor now must file a statement of intention within thirty (30) days of filing for relief, electing to surrender, redeem or reaffirm, and must perform such intention within forty-five (45) days of filing the statement, or on or before the date the § 341(a) meeting is held, whichever occurs earlier.

While one major objective of the Bankruptcy Code is to provide relief to financially-burdened debtors, the 1984 amendments to § 521 clearly were intended to provide some protection for consumer lenders, and to protect the non-debtor public from escalating credit costs. As the Seventh Circuit opined in *Edwards:*

> The 1984 Consumer Finance Amendments to the Bankruptcy Code [which included § 521] were intended, *inter alia,* to protect creditors from the risks of quickly depreciating assets and to keep credit costs from escalating because of the too ready availability of discharge. This legislative purpose speaks strongly against permitting debtors to improve their position dramatically against secured creditors by relieving them of personal liability. When a debtor is relieved of personal liability on loans secured by collateral, the debtor has little or no incentive to insure or maintain the property in which a creditor retains a security interest. The value of the collateral may fall below the level of the loan, leaving the creditor undersecured and driving up future costs of credit.

Edwards. 901 F.2d at 1386.

The Ninth Circuit's affirmance of the Bankruptcy Court's creation of a so-called "fourth option" under § 521(2) clearly is at odds with the legislative purpose of the 1984 amendments. By arbitrarily refusing to approve Respondent's voluntary reaffirmation agreement and allowing Respondent to keep the collateral without reaffirming his contractual personal liability for the full debt, Petitioner was deprived of the benefit of its bargain. As the Seventh Circuit reasoned, if a secured creditor can look only to its collateral in the event of default, a debtor will be less inclined to maintain insurance and to continue making monthly installments since he or she will not be held personally liable for any deficiency. Without the debtor's continued personal liability, there is little or no incentive to maintain insurance

on the collateral. And, such an arrangement encourages a debtor to forego maintenance or repair on the collateral, since if the collateral slips in value, the debtor can simply choose to stop making payments without penalty.

Moreover, requiring Chapter 7 debtors to make this statutory election is not inconsistent with the objective of providing relief to financially-burdened debtors. As the United States Bankruptcy Court for the District of Idaho reasoned in *In re Chavarria,* under the statute,

> [A] debtor will have at least 75 days to execute one of the [statutory] alternatives . . . [allowing] ample time after the filing of a bankruptcy to attempt a negotiated reaffirmation, or to make other suitable arrangements either to replace or refinance the collateral. In addition, both subsections (A) and (B) of [§ 521(2)] provide for extensions of the time limits for compliance with the election procedure for "cause" upon a timely request.

In re Chavarria, 117 B.R. 582, 585 (Bankr. D. Idaho 1990). Thus, if a debtor requires additional time, the bankruptcy court can grant such relief, yet at the same time also can evaluate what creditor protections, if any, may be appropriate in the interim (such as conditioning the extension on proof of continuing insurance). As the *Chavarria* court concluded, "This approach more closely serves the purpose of the statute by requiring the debtor to act promptly and mitigates against the insincere debtor." *Chavarria,* 117 B.R. at 585.[10]

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[10] Additionally, many of the courts who have refused to approve voluntary reaffirmation agreements appear to overlook a real practical benefit to debtors who reaffirm. Reaffirmation reinstates the debtor's contractual right to cure a post-reaffirmation default. By contrast, if a debtor simply retains the collateral without reaffirming, the right to cure may be discharged along with the contract, and the creditor may have

Finally, this Court has instructed that in the absence of express authority, statutes should not be interpreted to effect a major change in the rules which existed at the time of enactment, particularly if there is no discussion of a major change in the legislative history. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410, 419 (1992); *Ron Pair*, 489 U.S. at 244-245; *United Sav. Asso. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380 (1988). Prior to the enactment of the 1984 revisions to § 521, redemption and reaffirmation were the exclusive means by which a Chapter 7 debtor could retain collateral. *E.g., Bell*, 700 F.2d at 1058. There is absolutely nothing in the scant legislative history of § 521(2) which indicates that Congress intended to effect a major change in the law by creating a new alternative whereby a debtor could retain collateral simply by continuing to make payments.[11]

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the immediate right upon default to enforce its lien and repossess the collateral.

[11] H.R. 3150, entitled the "Business Bankruptcy Reform Act of 1998", which the House of Representatives passed on June 10, 1998 and now is in the process of being reconciled with S. 1301, entitled the "Consumer Bankruptcy Reform Act of 1997", approved by the Senate on September 23, 1998, also provides an unusual opportunity for a post-enactment glimpse at how the present Congress interprets the present version of § 521(2). H.R. 3150, 105th Cong. (1998); S. 1301, 105th Cong. (1998). Section 123 of H.R. 3150 would add a new subsection to § 521 which expressly clarifies that a Chapter 7 debtor may not retain possession of personal property which secures an allowed claim for the purchase price unless the debtor either reaffirms the debt or redeems the property within 30 days after the first meeting of creditors. And, Section 124 would allow a creditor to seek relief from stay if the debtor either does not file a timely statement of intention or does not act in accordance with the statement.

It is similarly worth remarking that the National Bankruptcy Review Commission, which is charged with the task of making recommendations to Congress regarding revisions to the bankruptcy laws and whose recommendations resulted in the aforesaid provisions of H.R. 3150, while not taking "a position on the proper reading of the current statute

The Ninth Circuit's interpretation of § 521(2) clearly is inconsistent with the legislative purpose.

3. The Ninth Circuit's decision is inconsistent with this Court's recent treatment of secured creditors' rights in bankruptcy .

Finally, as nearly every court which has refused to judicially legislate a so-called "fourth option" has noted, interpreting § 521(2) to permit a Chapter 7 debtor to retain collateral without redeeming or reaffirming effectively converts the secured obligation from recourse to nonrecourse, thereby impermissibly altering both the debtor's and the creditor's contractual rights and duties. Such a result is clearly inconsistent with this Court's recent (and not-so-recent) teachings regarding the impropriety of judicially-crafted, extra-statutory constrictions of secured creditors' rights. *See, e.g., Dewsnup*, 502 U.S. 410, 519 (1992) (holding Chapter 7 debtor is not entitled under 11 U.S.C. § 506(d) to "strip down" creditor's lien on real property to judicially determined value of collateral; "[G]iven the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent they become unsecured for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles."); *Butner v. United States,* 440 U.S. 48, 55 (1979) (whenever possible, courts should strive to preserve the

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that has caused a split in the circuit courts", recommended in its 1997 final report that § 521(2) *not* be amended to add a "ridethrough" option which would avoid the present requirement of redemption or reaffirmation if a debtor with a secured consumer debt desired to retain property post-discharge. "Bankruptcy: The Next Twenty Years", National Bankruptcy Review Commission Final Report, October 20, 1997, § 1.3.3 at 165-168.

parties' pre-bankruptcy agreement). *See also, e.g., and, compare, Associates Commer. Corp. v. Rash,* 520 U.S. 953 (1997) (giving full effect to express Chapter 13 cramdown provisions which permit a Chapter 13 debtor to retain and use collateral over the objection of a secured creditor notwithstanding displacement of traditional state law right to obtain immediate foreclosure upon a debtor's default, and valuing the amount of the creditor's secured claim as replacement value of property; given the express statutory language, this Court frowned upon both the Fifth Circuit's conclusion that the replacement value standard was disrespectful of state law, and the Seventh Circuit's "split-the-difference approach", since "[w]hatever the attractiveness of a standard that picks the midpoint between foreclosure and replacement values, there is no warrant for it in the Code.").

This Court should grant certiorari to curb the Ninth Circuit's unwarranted expansion of Chapter 7 debtors' property rights.

IV.

CONCLUSION

Bank of America respectfully urges this Court to grant Petitioner's petition for a writ of certiorari to resolve the split of authority regarding this important issue.

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Respectfully submitted,

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